ORIGINAL

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,	**Supreme Court: 141672**
Plaintiff-Appellant,	**Court of Appeals: 292602**
v.	**Circuit Court: 08-003062-FH**

ROBERT WILLIAM DUNCAN,

Defendant-Appellee.

_____/

141672

DEFENDANT-APPELLEE'S RESPONSE TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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The circuit court answered "YES."

The Plaintiff-Appellant answers "NO."

The Defendant-Appellee answers "YES."

II. **DID DUNCAN DEMONSTRATE INEFFECTIVE ASSISTANCE OF COUNSEL BY SHOWING THAT HIS COUNSEL'S ACTIONS WERE OUTSIDE THE RANGE OF PROFESSIONALLY COMPETENT ASSISTANCE AND THAT HE WAS PREJUDICED TO THE DEGREE THAT RELAIBILITY OF THE VERDICT WAS UNDERMINED WHEN HIS COUNSEL REPEATEDLY PERMITTED PREJUDICIAL, OBJECTIONABLE EVIDENCE TO BE INTRODUCED IN A CASE THAT ESSENTIALLY CAME DOWN TO "HE SAID-SHE SAID"?**

The circuit court answered "YES."

The Plaintiff-Appellant answers "NO."

The Defendant-Appellee answers "YES."

III. **DID DUNCAN DEMONSTRATE THAT THE NEWLY DISCOVERED EVIDENCE OF CHARLOTTE SOPO'S UNRELIABLE TESTIMONY MADE A DIFFERENT RESULT PROBABLE WHEN SHE WAS THE "GLUE" OF THE PROSECUTOR'S CASE?**

The circuit court answered "YES."

The Plaintiff-Appellant answers "NO."

The Defendant-Appellee answers "YES."

IV. **DID THE CUMULATIVE ERRORS OF IMPROPERLY ADMITTED HEARSAY, INEFFECTIVE ASSISTANCE OF COUNSEL AND NEWLY DISCOVERED EVIDENCE OF UNRELIABLE TESTIMONY DEPRIVE DUNCAN OF A FAIR TRIAL?**

The circuit court answered "YES."

The Plaintiff-Appellant answers "NO."

The Defendant-Appellee answers "YES."

COUNTER-STATEMENT OF FACTS

Plaintiff-Appellant filed a detailed recitation of the trial testimony. Additional facts follow.

Background.

On July 23, 2008, Robert Duncan was convicted by a jury in the Wayne County Circuit Court of three counts of third-degree criminal sexual conduct, MCL 750. 520d(1)(A). The charges arose out of an alleged sexual relationship in 2006 between Mr. Duncan and fourteen year-old Chelsea Shuckman. A post-conviction motion for new trial was filed on Mr. Duncan's behalf, and Wayne County Circuit Court Judge David J. Allen granted a new trial in May, 2009. (Exhibit A, *Opinion and Order*, May 20, 2009).

The People thereafter applied for leave to appeal to the Court of Appeals, which granted leave in August, 2009. On July 6, 2010, the Court of Appeals issued an opinion affirming Judge Allen's order granting a new trial (Exhibit B, *People v Robert Williams Duncan*, unpublished per curiam opinion of the Court of Appeals, decided July 6, 2010 (Docket No. 292602). The decision of the Court of Appeals' was a split decision, with Judge Christopher M. Murray dissenting.

The People thereafter applied for leave to this Court, which, in a December 17, 2010, Order directed that an argument be scheduled on whether to grant the application. The Court also directed the parties to address "whether the trial court abused its discretion in granting the defendant, for the reasons stated in the Court of Appeals dissenting opinion."

Trial.

"This case was, in essence, a credibility contest between the victim and defendant." (Exhibit B, Court of Appeals' Opinion, p. 8).

At the time of trial, Chelsea Shuckman was a sixteen year old high school student. She lived in a home in Huron Township on the same street as Mr. Duncan and his family. According to her mother, Bethany Shuckman, Chelsea works, baby-sits and gets good grades; however, Chelsea has also been in some trouble. At thirteen, she was suspended for possession of marijuana, and in October of 2006, she was suspended from school for distributing a picture of her ex-boyfriend in girl's clothing. (Trial transcript ("TT"), 7/17/2008, 87; 17-18; 89-90; TT, 7/22/2008, 80). Ms. Shuckman explained that she wanted to hurt her ex-boyfriend (TT, 7/17/2008, 91). Additionally, Mr. Duncan testified that he once caught her drinking his beer in his backyard (TT, 7/22/2008, 76). Melissa Duncan, one of Mr. Duncan's daughters, also testified that Chelsea was a habitual liar (*Id.* at TT, 7/17/2008, 207).

In the summer of 2006, Chelsea became good friends with the Duncan family. Chelsea and her sister, Courtney Shuckman, would go to Duncan's home all the time to hang out and the Duncan children would, in turn, come to their home. She was especially close to Melissa Duncan. Mr. Duncan threw a birthday party for Melissa that summer, and many neighborhood kids came to the party. Some were swimming and some were lying out by the Duncan pool. Courtney Shuckman, Chelsea's sister, testified that at this party, as the girls were lying out, Duncan stated he should spray them so they would have to get up and their straps would fall off (TT, 7/17/2008, 156). Courtney also testified Mr. Duncan suggested to everybody they "go

skinny dipping" (*Id.*). Chelsea testified that Mr. Duncan asked her to go skinny dipping, and that he told her she was "fucking beautiful" (*Id.* at 14). Mr. Duncan testified that he told the girls to put their straps on because they were going to be splashed when the others jumped in the pool and would give the boys a free show (TT, 7/22/2008, 77-78). Mr. Duncan also testified that Chelsea asked him if she and her boyfriend could go skinny dipping, and that he told her "no" (*Id.* at 79).

The first alleged incident happened on or around October 6, 2006, the weekend of the Homecoming Dance for the high school. Chelsea had planned on going to the game and dance but could not due to her suspension. She testified that Mr. Duncan came over to her house and walked upstairs and knocked on her bedroom door. She testified that she had a pair of his pants on and he told her to take them off (TT, 7/17/2008, 25-26). She also testified that he asked her to ride with him to pick up the others from the game (*Id.* at 26).

First alleged incident

Ms. Shuckman testified that later that day he picked her up at her home, then drove her to his home, where he kissed her (*Id.* at 108-114; 32). She further testified that Mr. Duncan told her to follow him if she wanted more; she did, and she followed him to Melissa's room, where the lights went off and the door was locked. They took off their clothes and had sexual intercourse on the floor for about five to ten minutes (*Id.* at 33, 35-38, 117). She testified they stopped because Duncan's fiancée was coming home. She got dressed and pretended to be on Melissa's computer.

Chelsea testified that Duncan told her not to tell anyone because of the grief they would

get. He stated it would be his third felony and he would go to jail, and he said people would call her a whore (*Id.* at 39, 40).

Mr. Duncan's testified that on October 6, 2006, Ms. Shuckman walked to his home around 7:15 p.m. (TT, 7/22/2008, 81). She came because she was having problems at home with her father, who had pushed her (*Id.*). She asked Duncan if he would adopt her (*Id.*). He denied kissing Chelsea and denied having sexual intercourse with her (*Id.* at 86-87). Mr. Duncan's fiancée, Kelly Brown, testified that she came home that evening around 7:05 p.m.-7:15 p.m. and found Chelsea sitting at the kitchen table and Duncan standing (*Id.* at 48). She asked what was going on and Chelsea wanting to be adopted was mentioned; Ms. Brown said she had heard Ms. Shuckman request this in the past (*Id.*).

The next day, October 7, 2006, was the Homecoming Dance. Chelsea was not going to the dance, due to her suspension, but she went over to the Duncan home to do Melissa's hair. She took pictures with her friends and sister that day before they went to the dance. Not one witness noticed any unusual or different behavior from Chelsea.

Second alleged incident

The second incident allegedly happened on December 22, 2006. The Shuckman sisters and the Duncan sisters decided to have a gift exchange after school at the Shuckman home. Chelsea testified that Sarah Duncan was on her cell phone and told Chelsea that Duncan wanted her to come to his home (TT, 7/17/2008, 49). Sarah did not hand her the phone. (*Id.*). However, she did talk to Duncan and he told her to go down to the basement (*Id.*). She testified she told her friends she would be back, but did not tell what she would be doing (*Id.* at 50). Courtney

Shuckman testified that Chelsea left the house, but Courtney did not know why and she was not really paying attention (*Id.* at 161-162).

Chelsea said that once at the Duncan home, she entered and went down to the basement where Duncan's room is located. He told her to lock the door; she complied. He was lying in his bed; she did not recall if he wore clothing (*Id.* at 51-52). He told her that he was scared she would tell someone. She got into the bed next to him, and they both removed their clothing (*Id.* at 54). She testified that he performed oral sex on her and then she on him (*Id.* at 55-57). Chelsea testified that she saw Duncan again and he told her to keep quiet because this would be his third felony (*Id.* at 61).

One of Mr. Duncan's daughters, Christine Sturgill, testified that she was at his home on that date, December 22, 2006. Also present at the home were several younger children. Ms. Sturgill said she was in the living room and kitchen area all day, and neither saw nor heard anyone come over. The basement stairs were situated such that a person would have to walk by her to get to the basement and, further, the doors are really loud so she would have heard someone (*Id.* at 67, 70). Melissa Duncan also testified that Chelsea never left the Christmas party exchange at the Shuckman's house (TT, 7/17/2008, 213).

Mr. Duncan denied Chelsea's version of events of December 22, 2006 (TT, 7/22/2008, 91-94).

Disclosure

After winter break, around February, 2007, Chelsea told a friend about the alleged affair

(TT, 7/17/2008, 62). The word got out and eventually back to Mr. Duncan's daughter, Melissa. Melissa confronted Courtney, who knew nothing, so together they went to Chelsea to ask her if the rumors were true; Chelsea admitted to the alleged affair (*Id.* at 65). Melissa did not believe it (*Id.* at 195).

Chelsea testified that after Melissa and Courtney confronted hers she called Mr. Duncan to alert him (*Id.* at 67). She said he told her that she only had to deny it (*Id.*). Subsequently, Mr. Duncan picked her up and took her to his mother's home. Melissa and Courtney were there, and Sarah arrived about ten minutes later. According to both Chelsea and Courtney, the six of them discussed whether or not to keep the alleged affair quiet (*Id.* at 72, 172).

Mr. Duncan testified that he never spoke to Chelsea on the phone on that day (TT, 7/22/2008, 114). He testified that he saw Melissa and Courtney on the street and picked them up; Melissa was crying and that is when he found out about the rumors (*Id.* at 114-115). Courtney testified that Duncan was angry and told Melissa she was overreacting; Melissa did not recall Duncan being angry (*Id.* at 168; 196). Mr. Duncan claimed that his initial reaction was to go to Mrs. Shuckman; however, Courtney told him her mother couldn't handle that because she was close to suicidal. Mr. Duncan then decided to take them to his mother's home to straighten it out (*Id.* at 117). Melissa testified that the topic of the meeting was what to do about the rumors (TT, 7/17/2008, 197).

During the meeting, Courtney testified, Mr. Duncan's mother stated that Mr. Duncan had "really messed up this time" (*Id.* at 170). Courtney and Chelsea claimed that Duncan stated he didn't want to go to jail (*Id.* at 74, 174). Courtney knew Duncan was saying this because of his

prior felonies (*Id.* at 174). Courtney also testified that Mr. Duncan said he would take his own life before he went to jail (*Id.*). Both Mr. Duncan and Melissa testified that Duncan had stated he would rather be dead then in prison for something he did not do (TT, 7/22/2008, 119; TT, 7/17/2008, 198).

Chelsea said she and the Duncan girls stopped being friends because of the affair. Melissa said they stopped being friends because Chelsea was a liar (TT, 7/17/2008, 207). Courtney Shuckman remained close to the Duncan sisters, however.

In March, 2007, Mr. Duncan threw a birthday party for his son. Both Chelsea and Courtney attended the party. Mr. Duncan testified that both girls were smiling and having fun, and neither acted scared or mad at him (TT, 7/22/2008, 99).

Charlotte Sopo, Mr. Duncan's ex-wife, testified that in May, 2007, Chelsea spoke with her at a baseball game. Chelsea started crying when Ms. Sopo asked why she was no longer friends with Melissa, but Chelsea did not tell her (TT, 7/16/2008, 171-172). Subsequently, Ms. Sopo spoke with Melissa (*Id.* at 173-174; 176). Melissa told her mother some information which caused Ms. Sopo concern (*Id.* at 175). Ms. Sopo then decided to inform Chelsea's mother, Bethany Shuckman (*Id.*). She told Ms. Shuckman that "there was something going on between my ex-husband [Duncan] and her daughter [Chelsea]," and that "they had sex" (*Id.* at 175-176).

The Shuckmans went to the police on June 4, 2007. Huron Township Police Detective Leo Girard later met with Chelsea and her family on June 21 (TT, 7/7/2008, 7). The detective interviewed Chelsea without her parents being present. She told him an incident -- she initially mentioned only one incident --happened either September 13th or 20th (*Id.* at 10, 9; TT,

7/17/2008, 100).

Detective Girard tried to interview Ms. Sopo, but the interview was delayed because Ms. Sopo had been arrested on June 5, 2007. After her son's baseball game, Ms. Sopo was intoxicated and made her thirteen-year-old daughter drive the car. Mr. Duncan was concerned about his children, so he called the police. (TT, 7/22/2008, 95-96). The Prosecutor used this incident to insinuate that Mr. Duncan was trying to get back at his ex-wife for telling Mrs. Shuckman of the alleged affair with Chelsea. Detective Girard finally interviewed Ms. Sopo in October, 2007 (*Id.* at 16).

Detective Girard then went to the high school to interview Melissa and Sarah. The girls were taken out of their class by a police officer. Once she knew of the topic, Sarah refused to be interviewed. Melissa told the Detective that Chelsea was a "bad girl" and things of that nature (TT, 7/17/2008, 206; TT, 7/22/2008, 22). The Detective stated that Melissa confirmed the topic of the meeting was about Duncan having sex with Chelsea, and said that she did not indicate her father said that he would not go to jail for something he did not do (TT, 7/22/2008, 22). Stacy Vespremi, the school's assistant vice principal, was also present at this interview. She confirmed that Melissa told the Detective that Duncan stated he would not go to jail for something he did not do (TT, 7/17/2008, 228, 230).

Detective Girard did not interview Sarah, and he did not interview any of Chelsea's doctors, teachers, or counselors, in order to find out about her behavior patterns (TT, 7/22/2008, 30-31, 35). Also, no phone records were ever recovered (*Id.*). Detective Girard's last interview was in October, 2007. He stated the delay in the investigation was partly due to Ms. Sopo, who

was the "glue" that bound the case because she brought it to light (*Id.* at 35).

Inadmissible evidence introduced at trial

The trial was littered with inadmissible evidence. The fact that Duncan had a record of prior felonies was mentioned time and time again (See, for example, TT, 7/17/2008, 39, 61, 174; TT, 7/22/2008, 75). Mr. Duncan's felony record is based on drug possession charges (TT, 7/22/2008, 75).

Hearsay statements came in several times without objections. Further, when there were objections, the jury was never told to disregard the statements. The following illustrates some of the hearsay:

From the testimony of Bethany Shuckman, relating to clothing worn by Chelsea:

> A: And I asked her about them, specifically. And she said they were Melissa's dad's (TT, 7/16/2008, 153).

There was this from Charlotte Sopo:

> Q: Specifically, what words did you utter to Chelsea's mom?
>
> A: That there was something going on between my ex-husband and her daughter.

(*Id.* at 176).

There were these from Chelsea Shuckman:

> A: She told me that her dad wanted me to go down there (*Id.* at 49).

Q: And when she (Melissa) confronted you what did you tell her?

A: I told her it was true.

Q: Why did you tell her that?

A: Because I told her I would lie to anybody else (*Id.* at 65).

A: ....I called the defendant and told him that I told his daughter and told her it was true and I wasn't going to lie anymore.

Q: What if anything did you say to him?

A: That I told her the truth and I told her it happened. I told him what I said and she's on her way home.

Q: And what did you say?

A: I said I'm not denying any longer. I'm done. I'm done living my life in a lie.

Q: And what did he say to all that?

A: .....and I said that my sister is walking her home (*Id.* at 67).

A: I told them I was leaving, yeah (*Id.* at 131).

The following came from Courtney Shuckman:

Q: Did she tell you where she had gone?

A: Over their house (*Id.* at 162).

Q: Okay. How did the mom appear?

A: All I can remember her saying is Billy—you really messed up this time

(*Id.* at 170).

The following is from Melissa Duncan:

Q: Okay. But did you confront Chelsea at some point to ask her if it was true?

A: Yes.

Q: And she told you it was, didn't she?

A: Yes (*Id.* at 195).

The following is from Ms. Vespremi:

Q: Okay. And what was she asked about what her decision was about what to do about it or whether there was a decision made about whether to discuss it or not?

A: They were told not to discuss it (*Id.* at 228).

Jury Instructions

In regards to Mr. Duncan's felony convictions, the court charged that:

"There has been evidence that the Duncan has been convicted of a crime. You may consider this evidence only in deciding whether you believe the Duncan is a truthful witness. You may not use it for any other purpose. Past conviction is not evidence that the Duncan committed the alleged crime in this case." (TT, 7/22/2008, 164-165).

The court never instructed the jury on what a "sustained" ruling meant. Neither did Defense counsel request the court so instruct the jury. Further, defense counsel did not object to the evidence of Duncan's prior felony convictions.

Affidavit of Charlotte Sopo

Subsequent to the filing of the *Motion for Judgment Notwithstanding the Verdict or for New Trial*, new evidence came to light. On September, 26, 2008, Charlotte Sopo executed an affidavit concerning her trial testimony and the conduct of the Prosecutor and Detective Girard. (Exhibit C, *Affidavit of Charlotte S. Sopo*).

Ms. Sopo states that just before she was called to testify she had "an awful argument with Louisa Papalas and Detective Girard" (*Id.* at 1). They called her into a room and told her that she must "remember" that she had given Detective Girard permission to interview her daughters at school (*Id.*). She states that she never in fact gave Detective Girard permission. Instead, she repeatedly refused to permit him to interview the Duncan daughters (*Id.*). She asserts that Ms. Papalas was aware that Detective Girard never had permission (*Id.*).

Ms. Sopo also stated that Mr. Duncan did in fact call the police on her for drinking and driving. It was her third offense. However, she does not blame him for her troubles (*Id.*). She stated that at the trial she wanted to clarify that she did not blame Mr. Duncan, when the Prosecution was making it appear Mr. Duncan was getting revenge (*Id.* at 2).

Ms. Sopo asserted that from the beginning of the case she was "pressured something terrible" by the Prosecutor (*Id.* at 1). At the first court date, Ms. Papalas introduced Ms. Sopo to a man named Larry, who worked for Child Protective Services (*Id.*). Ms. Sopo was on probation at the time and was frightened of losing her children (*Id.*). Naturally, the presence of Larry intimated her further (*Id.*). Ms. Sopo asserted that the Prosecutor told her that her children would go to foster care if Ms. Sopo did not "comply" with her, and "we don't want to take your kids from you right now but we can," and "these are serious charges and you will be responsible if he gets off because you are the only person this girl turned to" (*Id.*). Ms. Sopo then told Ms. Papalas that she barely remembered anything. The Prosecutor responded by reminding her that she had children and a past (*Id.*).

Ms. Sopo was frightened during and after her testimony because she believed that the Prosecutor might carry out her threats (*Id.*). Ms. Papalas made it clear to Ms. Sopo that Larry would be in court throughout the trial to make sure she "complied" (*Id.* at 2). Ms. Sopo stated that she still could remember many details, and barely remembered Chelsea crying at the game or speaking with her daughters afterward (*Id.* at 1, 2). Finally, Ms. Sopo asserted that she believes that she was forced into giving her testimony because of the pressure and threats directed at her by the Prosecutor. (*Id.*).

Motion for Judgment Notwithstanding the Verdict or For New Trial

Mr. Duncan filed a *Motion for Judgment Notwithstanding the Verdict or For New Trial* and then an *Amended Motion for Judgment Notwithstanding the Verdict or For New Trial.* The case was argued in December, 2008, and, on May 20, 2009, the trial court granted a new trial for " . . . serious errors (admission of felony convictions, corroborating hearsay testimony, hearsay statement determining guilt and potentially questionable testimony of Charlotte Sopo) in the aggregate denied Duncan what otherwise would have been a fair trial and call into question the integrity and public reputation of this Court's judicial proceedings." (See Exhibit A).

COUNTER-ARGUMENTS

I. THE ERROR OF IMPROPERLY ADMITTED HEARSAY IN A CASE WHERE TESTIMONY WAS THE ONLY EVIDENCE PRESENTED DID INDEED "SERIOUSLY AFFECT THE FAIRNESS, INTEGRITY OR PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS."

Standard of Review

Plaintiff-Appellant correctly stated that applicability of plain error review where alleged error was not timely preserved by objection. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *People v. Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999)(citations omitted).

However, "[t]he decision whether to grant or deny a motion for a new trial is entrusted to the discretion of the trial court and that decision will not be disturbed on appeal without a showing of an abuse of discretion." *People v. Hampton*, 407 Mich 354; 285 NW2d 284 (1979)(citations omitted). "An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v. Underwood*, 184 Mich App 784, 786; 459 NW2d 106 (1990).

Analysis

While, on the one hand, hearsay admitted without objection may be considered competent evidence and even may be considered by an appellate court in support of the findings

of a criminal case (see *People v. Maciejewski*, 68 Mich App 1, 3; 241 NW2d 736 (1976)(citations omitted), that does not mean it may not be viewed as error by the trial court on a motion for new trial. See *People v. Carines*, *supra*. The question is not whether the un-objected-to hearsay was competent evidence, but is whether the trial court abused his discretion in finding that it was plain error to admit the hearsay. An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v. Underwood*, *supra*.

"Hearsay" is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801(c). The People argue in the application (p. 33), that out-of-court statements by the victim and Ms. Sopo, are not hearsay because the two were present at trial; *People v. Harris*, 201 Mich App 147, 151 (1993), was cited in support. The People's characterization short-changes the hearsay rule, which prohibits out-of-court statements offered for the truth of the matter asserted, as the *Harris* case, for example, noted. The *Harris* Court found the examples there not offered for the truth of the matter asserted; basically, the truth of the statements in *Harris* did not matter to the case. In the instant case, the truth of the matter asserted was key to the probative value -- and to the prejudice sustained by Mr. Duncan. For example, Ms. Sopo's statements to Bethany Shuckman related that something sexual was going on between her ex-husband and Chelsea. Whether or not something 'was going on' was the ultimate issue in the case, and the recitation of the prior out-of-court statements was inadmissible hearsay. *People v Malone*, 445 Mich 368, 387-388;

518 NW2d 418 (1994); MRE 801(c).

Chelsea's recitation of her earlier statements similarly constituted inadmissible hearsay, as follows:

> Q: And when she (Melissa) confronted you what did you tell her?
>
> A: I told her it was true.
>
> Q: Why did you tell her that?
>
> A: Because I told her I would lie to anybody else (TT, 7/16/2008, 65).
>
> ---
>
> A: ....I called the Duncan and told him that I told his daughter and told her it was true and I wasn't going to lie anymore.
>
> Q: What if anything did you say to him?
>
> A: That I told her the truth and I told her it happened. I told him what I said and she's on her way home.
>
> Q: And what did you say?
>
> A: I said I'm not denying any longer. I'm done. I'm done living my life in a lie.
>
> Q: And what did he say to all that?
>
> A: .....and I said that my sister is walking her home (*Id.* at 67).

Similarly, Melissa's testimony about confronting Chelsea *about the truth of the rumors* (basically of whether or not something sexual was going on) provided additional unfairly prejudicial and inadmissible hearsay, directly relevant only to the truth of the matter asserted, i.e., that Mr. Duncan was sexually involved with Chelsea, where Chelsea told Melissa (per Melissa) that the rumors were true.

In the dissent below, Judge Murray erred by diminishing the error of hearsay on the basis

that inadmissible hearsay was corroborative of other hearsay. For example, while recognizing that "[t]here is no doubt that some of the inadmissible evidence supported the victim's credibility in that it buttressed what she said happened, or conversely could have damaged defendant," [but] "several hearsay statements made by the victim were simply a repetition of what she had already testified to in open court" (Appendix B, dissenting opinion of Judge Murray, p. 4).

The People mistakenly contend that the present sense impression hearsay exception applies in this case to, for example, Melissa's statements and to those of Ms. Vespremi. Melissa Duncan testified as follows:

> Q: Okay. But did you confront Chelsea at some point to ask her if it was true?
>
> A: Yes.
>
> Q: And she told you it was, didn't she?
>
> A: Yes (TT, 7/16/2008, 195).

Ms. Vespremi testified as follows:

> Q: Okay. And what was she asked about what her decision was about what to do about it or whether there was a decision made about whether to discuss it or not?
>
> A: They were told not to discuss it (TT, 7/16/2008, 228).

The Prosecutor fails to convincingly explain how any of these statements are present sense impressions. In *People v. Hendickson*, 459 Mich 229, 236; 586 NW2d 906 (1998)(citations omitted), a present sense impression was found when the victim stated she had

just been beaten. *Id.* at 236. The Court found a present sense impression because the victim 1) explained the perceived event; 2) personally experienced the event; and 3) made the statement while the defendant was leaving the house. *Id.* The statements in the instant case either do not explain any perceived events and/or they were not made substantially contemporaneously with the event. The prosecutor's interpretation, if extended to its logical conclusion, would gut the hearsay rule, for it would allow a wide-range of otherwise inadmissible hearsay into evidence merely because a witness perceived a declarant make the statement. Such an end-run around the rules of evidence is both prohibited and inadvisable.

Plaintiff-Appellant characterizes the following statement from Bethany Shuckman as non-hearsay:

> A: And I asked her about them, specifically. And she said they were Melissa's dad's (TT, 7/16/2008, 153).

Evidence that Chelsea wore Duncan's pants at some point in time definitely suggests there may be some inappropriate activity between Mr. Duncan and Chelsea. Unless offered for the truth of the matter asserted, the evidence has no relevance. It is, in other words, only relevant for the prejudicial effect from the inference that might be drawn, or from the speculation in the minds of jurors sure to follow.

The Prosecutor admits that the statements below were, in fact, hearsay:

> Q: Did she tell you where she had gone?
>
> A: Over their house (TT, 7/16/2008, 162, testimony of Courtney Shuckman).

Q: Okay. How did the mom appear?

A: All I can remember her saying is Billy—you really messed up this time (*Id.* at 170, testimony of Courtney Shuckman).

However, the Prosecutor argues that these statements were cumulative of the trial testimony and/or not outcome determinative. The statement made by Courtney Shuckman was cumulative, but cumulative of *another hearsay* statement. Further, to hear that Mr. Duncan's *own mother* made that statement is extremely damaging to the defense; the hearsay suggests that the mother either believed him guilty or, at a minimum, capable of such behavior.

The combined effect of the hearsay statements was extremely prejudicial to Mr. Duncan's case and very likely had an effect on the outcome. The Prosecutor's entire case -- a 'he said, she said scenario -- was based upon testimony; there was no relevant forensic evidence. The fact that a multitude of damaging hearsay statements were constantly admitted definitely affected the "fundamental fairness" and "basic integrity" of the proceedings, as both the trial court and the Court of Appeals' majority properly found.

II. DUNCAN'S COUNSEL'S ACTIONS OF REPEATEDLY PERMITTING PREJUDICIAL, OBJECTIONABLE EVIDENCE TO BE INTRODUCED IN A CASE THAT ESSENTIALLY CAME DOWN TO "HE SAID-SHE SAID" WERE OUTSIDE THE WIDE RANGE OF PROFESSIONALLY COMPETENT ASSISTANCE AND PREJUDICED DUNCAN TO THE DEGREE THAT RELAIBILITY OF THE VERDICT WAS UNDERMINED.

Standard of Review

Plaintiff-Appellant correctly stated the standards of review. Defendant-Appellee adds that ineffective assistance of counsel claims involve a determination of whether or not counsel's performance, in light of prevailing professional norms, was deficient, and that deficient performance prejudiced the defense. *People v. Reed*, 449 Mich 375; 535 NW2d 496 (1995); *Strickland v. Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Kimmelman v. Morrison*, 477 US 365; 106 S Ct 2574; 91 L Ed 2d 305 (1986).

Analysis

In this case, Mr. Duncan's trial counsel was ineffective. He did not object to the admission of Duncan's otherwise-inadmissible prior convictions. The convictions were not shown to involve theft or dishonesty and were not inadmissible, even for purposes of impeachment. Mr. Duncan only had his word to prove his innocence. Obviously, in a case such as this, any competent attorney should attempt to exclude prejudicial potentially inadmissible evidence so that it would not sway the jury's opinion of Duncan and his story. However, instead of objecting, defense counsel asked Duncan about his convictions and permitted statements concerning these convictions to be mentioned time and time again.

As to the hearsay, Duncan's counsel rarely objected. Further, even where an objection was raised and sustained, the jury had no guidance on the meaning of "sustained." Therefore, it is impossible to know whether the jury disregarded any of these statements. These statements all served to help establish the complainant's story and to discredit Mr. Duncan. Any competent attorney would at least have attempted to ensure that the jury would not consider them.

Mr. Duncan acknowledges that there is a high burden on one claiming ineffective assistance of counsel. *Strickland, supra.* The trial court recognized that the burden was high, but also noted that counsel's allowing so much inadmissible evidence slide into the record was a determining factor. (See Appendix A, pp. 7-9). As the People argue in the application, hearsay not objected to should be deemed competent evidence (Application, p. 32; *Maciejewski, supra*); counsel's failures to object, however, only further, and rightly, convinced the trial court that Duncan's counsel did not use "reasonable professional judgment." See *People v. Reed, supra.*

The fact that there was not one shred of physical evidence in this case weighed in heavily on the trial court's decision. (See Appendix A, p.9). The Prosecutor argues -- and Judge Murray in his dissent agreed -- that Chelsea's testimony was corroborated by the other witnesses. However, the essential parts of Ms. Shuckman's story were not sufficiently corroborated.

The Prosecutor tried to paint [redacted] Duncan as some pervert who made inappropriate comments to and used vulgar language with young girls. The testimony regarding Duncan's comments regarding skinny dipping, the girls' bathing suit straps, and calling Chelsea beautiful was all varied. Regardless of the true versions, these incidents prove nothing alone. There was

not enough corroboration of the essential facts to make what the Duncan did or didn't say to fourteen year old girls matter.

Notwithstanding the fact that it is incredible to believe that a forty year-old man would have sexual intercourse with a fourteen year-old girl while his young son was home, Chelsea's version of the first alleged incident seems unlikely. Chelsea could not remember the month that the first alleged incident happened (TT,7/17/2008, 105). She could not remember what time she went over to Duncan's home (*Id.* at 108-114). At one point, she stated she went over there at 8:00 p.m. (*Id.*). However, Kelly Brown testified she came home around 7:15 p.m. She could not remember how long they engaged in sexual intercourse (*Id.* at 117). Further, Duncan and Ms. Brown corroborated that Ms. Brown came home and found them in the kitchen discussing adoption, and that Chelsea was not at the computer in Melissa's room (TT, 7/22/2008, 81, 86). Finally, the day after the alleged incident, Chelsea was at Duncan's home again. She was acting like nothing had happened. At trial, the Prosecutor stressed how emotionally upsetting this affair was for Chelsea. She felt the need, over and over again, to point out that Chelsea was crying over the affair when forced to speak of it. However, the day after the first alleged sexual act, Chelsea was at Duncan's home acting as if she had no cares in the world. There was so much inconsistency with regards to this first incident that it is hard not to very strongly doubt Ms. Shuckman's story.

There is also much inconsistency as to the second alleged incident. Chelsea supposedly left a party to go meet with Duncan at his home. Ms. Shuckman stated that Sarah, Mr. Duncan's daughter, told her he wanted her to come over, but that Sarah did not hand her the phone (TT,

7/17/2008, 49). However, she next stated Mr. Duncan told her to come to the basement (*Id.*). It is unclear how Duncan told her to meet him in the basement if she did not speak with him on the phone. Again, he supposedly asked her to come over when some of his children were home. Also, Melissa Duncan, who attended the party at Chelsea's home, testified Chelsea never left (*Id.* at p. 213). Courtney stated Chelsea did leave but admitted she was not paying much attention (*Id.* at 161-162). Kelly Brown's daughter, Christine, was at Duncan's home all day and never saw or heard Chelsea (TT, 7/22/2008, 67). Christine and Duncan both testified that the doors at Duncan's home were very loud (*Id.* at 70, 93-94). As with the first incident, Chelsea's story could not be reasonably and reliably corroborated.

The only part of Ms. Shuckman's story that the rest of the testimony corroborated was the meeting that occurred in February of 2007. The Prosecutor put strong emphasis on the topic of the meeting being about the sexual affair. She tried to paint Melissa as a liar when she testified that the meeting was about the rumors. Either way, it is the same topic. The rumors were about the alleged sexual affair.

Finally, Ms. Sopo's testimony was basically irrelevant to the truth. She heard about the rumors from Melissa and told Chelsea's mother. This does nothing to prove Chelsea's story. The Prosecutor made a big deal of the fact that after Ms. Sopo told Mrs. Shuckman, Mr. Duncan called the police on Ms. Sopo for drunk driving. This had to be his ploy to get back at her for telling on him. The prosecutor's argument unreasonably belittles the fact that Ms. Sopo, who was too intoxicated to drive, made Mr. Duncan's thirteen year-old daughter drive the car.

The Prosecution's case was solely dependent on the testimony of one person. There was not one shred of physical evidence. There was not one person that could corroborate the essential parts of Chelsea's story. The trial court rightly recognized that, in a case where testimony was the sole evidence and that evidence so contrasts between the accused and accuser, the accused counsel's failure to insure that the jury not be permitted to hear inadmissible evidence inevitably affected Duncan's chance of acquittal.

III. THE NEWLY DISCOVERED EVIDENCE OF CHARLOTTE SOPO'S UNRELIABLE TESTIMONY INDEED MADE A DIFFERENT RESULT PROBABLE WHEN SHE WAS THE "GLUE" OF THE PROSECUTOR'S CASE.

Standard of Review

The Plaintiff-Appellant correctly stated the standard of review as review for an abuse of discretion. *People v. Canter*, 197 Mich App. 550, 560; 496 NW2d 336 (1992).

Analysis

Subsequent to the trial, Charlotte Sopo executed an affidavit calling into question the accuracy of her testimony. (See Appendix C). The Prosecutor does not seem to dispute that the affidavit in question is new evidence or cumulative but, that it is not a recantation, merely a rant,

and would not have changed the outcome of the trial since Ms. Sopo never actually stated she lied[1].

Mr. Duncan disagrees. As Detective Girard stated, Charlotte Sopo was the "glue" that bound the case because she brought it to light (TT, 7/22/2008, 35). If she could not remember Chelsea crying to her or speaking with Ms. Shuckman, then the Prosecutor's case becomes considerably weaker. The jury may not have been so quick to believe Chelsea. If she were to tell the jury she did not believe Duncan was trying to get revenge on her by calling the police then the Prosecutor has one less card in her deck.

The Prosecutor argues that Ms. Sopo's testimony was not the sole crucial evidence. (See *Prosecutor's Application for Leave to Appeal, Argument*, p. 47). However, her testimony did play a critical role, as outlined above, and because she brought the alleged affair out in the open. Although Duncan is aware the courts view recantations with skepticism, in a case such as this hotly-contested he said-she said based only upon testimony, where even the Prosecutor recognizes the importance of this witness, it is difficult not to question the fairness of the trial and truth of the testimony when new evidence such as this comes to light.

Further, opposed to the Prosecutor's claim that Ms. Sopo's motives for testifying were clear--her concern for Ms. Shuckman (See *Prosecutor's Application for Leave to Appeal, Argument*, p. 47) -- this affidavit actually calls into question Ms. Sopo's motives for testifying.

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[1] To correct a glaring inaccuracy in the Prosecutor's Application for Leave to Appeal, Ms. Sopo **did not** testify that the victim told her that she and the defendant were having sexual relations. (See *Prosecutor's Application for Leave to Appeal*, p. 45). Ms. Sopo testified that **her own daughter** told her about the alleged affair. (See *July 16 Trial Transcript*, p. 175-176, *Prosecutor's Application for Leave to Appeal, Facts*, p. 7).

Although the trial court did not find prosecutorial misconduct, the fact that Ms. Sopo was, essentially, threatened with losing her children (See Exhibit B, *Affidavit of Charlotte S. Sopo*) quite clearly calls her motives for testifying into question.

Finally, the trial court did not actually base its decision to grant a new trial merely on Ms. Sopo's affidavit. (See Exhibit A, p. 4). The trial court, however, thought the affidavit brought to light that her testimony was potentially questionable (*Id.* at 11).

IV. THE TRIAL COURT PROPERLY DETERMINED THAT THE CUMULATIVE ERRORS OF IMPROPERLY ADMITTED HEARSAY, INEFFECTIVE ASSISTANCE OF COUNSEL AND NEWLY DISCOVERED EVIDENCE OF UNRELIABLE TESTIMONY DEPRIVED DUNCAN OF A FAIR TRIAL.

Standard of Review

The Plaintiff-Appellant stated there is no standard of review. Mr. Duncan contends that the cumulative effect of prejudicial error implicates the due process guarantees of the Fourteenth Amendment and Const. 1963, art. 1, §17, and as a question of law is reviewed de novo. *People v Knapp*, 244 Mich App 385, 388; 624 NW2d 227 (2001); *People v Malone*, 180 Mich App 347; 447 NW2d 157 (1989); *People v Skowronski*, 61 Mich App 71, 77; 232 NW2d 306 (1975); *Hebert v Louisiana*, 272 US 312, 316; 47 S Ct 103; 71 L Ed 270 (1926).

A trial court may grant a new trial if it finds the verdict was not in accordance with the evidence and that an injustice has been done. *People v. Simon*, 174 Mich App 649, 653, 436 NW2d 695 (1989)(citations omitted).

Analysis

The court may order a new trial on any ground that would support appellate reversal of the conviction . . . MCR 6.431(B). A new trial may be granted as to all or part of the issues, where substantial rights have been materially affected. MCR 2.611(A)(1). While "the cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not," "only actual errors are aggregated to determine their cumulative effect." *People v. LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002).

The trial court determined that the "serious errors . . . in the aggregate denied defendant what otherwise would have been a fair trial and call into question the integrity and public reputation of this Court's judicial proceeding." (See Exhibit A, p. 11). The trial court based this decision, not upon one specific thing, but upon the numerous errors revealed in the pleadings and on the record. The inadmissible hearsay, ineffective assistance counsel and newly discovered evidence were actual errors which affected the fairness of the trial. The Prosecutor has not shown the trial court's decision to be an abuse of discretion and accordingly, this Court should not disturb the grant of a new trial and should leave intact the Court of Appeals' majority opinion.

Judge Murray's dissenting opinion in the Court of Appeals fails to recognize the cumulative adverse impact upon Mr. Duncan's constitutional rights to a fair trial. On the one hand, Judge Murray correctly states that the testimony alone of a complaining witness may constitute *legally sufficient* evidence to support a conviction (where believed by the fact-finder beyond a reasonable doubt)(Dissenting opinion, p. 3-4). Judge Murray appears to use the legal sufficiency (from Chelsea's testimony) to justify the utilization of the otherwise-inadmissible 'corroborating' hearsay evidence in securing the guilty verdicts. However, Judge Murray failed to adequately consider that in a non-forensic-evidence, he said-she said case, as here, the real

issue is not one of legally sufficient evidence -- which one would ostensibly find in any case where a complaining witness testifies from personal experience -- but the issue is one of competing and contrasting credibility of the diametrically-opposed witnesses. Corroborating evidence plays a key and very real role. Prejudicial hearsay takes on an entirely more significant role in this type of case, than it might, for example, in a case with overwhelming physical evidence. Are we to seriously believe, for example, that the hearsay statements attributed to Mr. Duncan's mother, essentially 'you did it and you really messed up,' had no injurious effect?

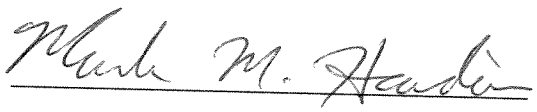
Judge Murray correctly noted that inadmissible evidence was presented to the jury, and served to bolster Chelsea's version of events: "There is no doubt that some of the inadmissible evidence supported the victim's credibility in that it buttressed what she said happened, or conversely could have damaged defendant" (Dissenting opinion, p. 4). That is the real issue, is it not? Judge Murray, erroneously Defendant-Appellee contends, concluded that "[t]here was more than ample untainted evidence supporting defendant's conviction" (*Id.* at p. 5). The buttressing of the complaining witness, and damaging the defendant, in a contested 'he said- she said' case, *are* the very real -- and, in this case, *existing* -- dangers.

The inadmissible hearsay allowed to contaminate the proceedings, largely through trial counsel's deficient performance, operated to deprive Mr. Duncan of a fair trial and due process of law. As a result, a new trial is the proper remedy.

CONCLUSION

WHEREFORE, for the reasons stated herein, Defendant-Appellee, Robert Duncan, respectfully requests that this Honorable Court deny the Prosecutor's requested relief on Appeal.

Respectfully submitted,



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